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Navigating the Discovery Chess Match Through Effective Case Management

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NAVIGATING THE DISCOVERY CHESS MATCH THROUGH EFFECTIVE CASE MANAGEMENT

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I. INTRODUCTION

Litigation is a challenging process. It can present difficulties for the most seasoned counsel in even straightforward lawsuits. A combination of procedural complexities and shrewd adversaries, together with judges and juries, make litigation an unpredictable environment.

Litigation is often compared to a chess match. As with chess, litigation involves various component pieces. Pleadings, discovery, and trial—like pieces on a chessboard—are quite different, though not mutually exclusive. Like bishops and knights, they are sufficiently distinct to require independent mastery and expertise. Nevertheless, they must also be integrated to ensure that a matter is properly litigated.

This is particularly the case with discovery. Discovery is so replete with nuances and subtleties that practitioners can find themselves trapped by an unwitting or imprudent decision. Over time, strategically poor choices can weaken or even destroy meritorious claims and defenses.[1]

1. *See* Waymo LLC v. Uber Techs., Inc., No. C 17-00939, 2018 WL 646701 at *23 (N.D. Cal. Jan. 30, 2018) (issuing a permissive adverse inference instruction against defendant for its destruction of relevant electronic data).

Savvy counsel do not obtain favorable results in discovery by accident or surprise. They skillfully navigate the process through effective case management.[2]

That case management might fall within the responsibility of counsel may come as a surprise to some lawyers.[3] By rule and also by tradition, case management is generally considered the court's responsibility.[4] Indeed, the Federal Rules of Civil Procedure ("FRCP," "Rule," or "Rules") emphasize the need for active and involved judicial case management to ensure that discovery satisfies the threefold objectives of FRCP 1.[5] And yet, experienced lawyers know that case management begins with counsel.

Case management requires a thorough understanding of the claims and defenses in play. It also entails having a vision of the different scenarios for how a matter could resolve, together with the foresight to steer a case toward the best result for the client. Effective case managers also have sufficient flexibility to address unexpected challenges along the way. Mastery of these items is essential for counsel to successfully manage a case toward resolution.

Nevertheless, case management requires much more than this. Because adversaries[6] and courts[7] may erect barriers to accomplishing discovery objectives, counsel must develop an understanding of the

2. *See* City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 491 (N.D. Ill. 2018) (commending the instructive efforts of counsel in cooperatively negotiating a protocol addressing the discovery of electronic information).

3. *See* FED. R. CIV. P. 16; Siriano v. Goodman Mfg. Co., L.P., No 2:14-cv-1131, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015) ("the Federal Rules of Procedure also contemplate active judicial case management.").

4. *See generally* Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013); *see also* Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 207 (2013) (referencing a court's case management responsibilities).

5. Chief Justice John G. Roberts, *2015 Year-End Report on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES at 7 (Dec. 31, 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [perma.cc/E24X-HMNX] ("The amended rules accordingly emphasize the crucial role of federal judges in engaging in early and effective case management."). As the Advisory Committee observed in the 2015 amendments to FRCP 26, court intervention may be required "when the parties are legitimately unable to resolve important differences." FED. R. CIV. P. 16 advisory committee's note to 2015 amendment.

6. *See* Webasto Thermo & Comfort N. Am., Inc. v. BesTop, Inc., 326 F.R.D. 465, 469 (E.D. Mich. 2018) (addressing plaintiffs' discovery motions after defendant stymied efforts to identify relevant information by preparing "overly broad" search terms that ran afoul of the parties' ESI protocol).

7. *See* Sender v. Franklin Resources Inc., No. 11-cv-03828, 2016 WL 814627, at *2 (N.D. Cal. Mar. 2, 2016) (ordering a Rule 30(b)(6) deposition on multiple topics rather than allowing plaintiff to take both written discovery and five separate depositions).

procedural vehicles the FRCP offers for addressing discovery issues that might otherwise stop the progress of litigation.[8] Counsel should also consider the benefits of strategic cooperation with adversaries and the court.[9] This may very well entail transparency with opposing counsel and the judge on certain discovery issues.[10]

With a thorough knowledge of procedure and a willingness to engage in adversarial cooperation, counsel will be well situated to adopt case management methods that can deftly guide a matter through the discovery chess match toward an efficient and effective resolution.[11] Understanding the nature of those methods is essential to accomplishing this objective.[12]

In this article, I explore some ways that counsel can better manage a case in discovery. In Part II, I examine the overall importance of proactive discovery planning for purposes of effective case management. This includes an analysis of the key FRCP provisions that emphasize such planning and the role these provisions—if properly used—can play in helping to direct the course of discovery. I also highlight the benefits of pursuing informal opportunities for discovery planning and case management.

With an understanding of these issues, Part III explores three different methods for facilitating case management. The first discusses the benefits of transparently using proportionality standards to more efficiently resolve preservation disputes over electronically stored information ("ESI"). Too often parties resort to unilateral preservation strategies. While seemingly effective, those strategies often lead to increased preservation costs and litigation risks. In contrast, counsel who transparently apply proportionality standards may stand a better chance of facilitating resolution of preservation issues.

The second method involves providing early and more fulsome initial disclosures to enhance the potential for a successful FRCP 26(f) discovery conference. Initial disclosures that offer additional specifics supporting claims or defenses in advance of the Rule 26(f) conference may help the parties frame their efforts to obtain discovery on core issues for their respective litigation positions.

The third method focuses on the advantages of cooperation over unilateral conduct in connection with the development and use of search

8. *See* Shaffer & Shaffer, *supra* note 4, at 181 (emphasizing the need for counsel to both understand and follow "the letter and spirit of the discovery rules.").

9. *See* Roberts, *supra* note 5, at 6.

10. *See* Gensler & Rosenthal, *supra* note 4, at 853.

11. *See* discussion *infra* Part II.

12. *See* discussion *infra* Part III.

methodologies. To be sure, adversarial cooperation may not be merited or even possible in a particular matter. Nevertheless, parties should still consider engaging in cooperative advocacy regarding search methodologies given its potential for facilitating the identification of relevant ESI. This, in turn, can help decrease costs and minimize delays.

II. THE ROLE OF PROACTIVE DISCOVERY PLANNING IN CASE MANAGEMENT

A key aspect of effective case management is found in the adequacy of counsel's preparation to engage in discovery. Adequate discovery preparation includes at least two items. The first involves assessing the relevant information a client has in its possession, custody, or control. The second is mastering the FRCP provisions that provide counsel with opportunities to cooperatively dispose of issues that could stall the progress of a case. If counsel has sufficiently prepared in both of these areas, they can more readily move a client's case through discovery.

A. Assess the Client's Relevant Information

Counsel can hardly expect to engage in discovery, much less litigate a matter through trial, without a thorough grasp of the client's evidence.[13] A knowledge of the client's relevant data, together with the custodians and other sources in possession of that information, can facilitate proactive discovery planning.[14] Assessing the quality and nature of that information, particularly at the outset of a matter, can greatly assist case management efforts.[15]

To obtain such information, counsel should take various steps to confirm its existence. This includes meeting with client representatives,

13. *See* GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318, 2018 WL 273649, at *4 (D. Del. Jan. 3, 2018), *aff'd in part and vacated in part*, 930 F.3d 76 (3d Cir. 2019) (denying plaintiff's motion for new trial due to (among other things) its failure to adduce supporting evidence from its own records to support its antitrust claims).

14. *See* Small v. Univ. Med. Ctr., No. 13-cv-0298, 2018 WL 3795238, at *60 (D. Nev. Aug. 9, 2018) ("Parties to lawsuits and their lawyers may not avoid their legal duties to preserve and produce discoverable information because no one devotes sufficient time to find out what the party has, stores, and preserves.").

15. *See* HM Elecs., Inc. v. R.F. Techs., Inc., No. 12-cv-2884, 2015 WL 4714908, at *14 (S.D. Cal. Aug. 7, 2015), *vacating as moot* 171 F. Supp. 3d 1020, 1033 (2016) (imposing sanctions on defendant's counsel and finding that counsel should have begun "familiarizing himself with his client's ESI and embracing transparency and collaboration in the discovery process" instead of choosing "to sign false discovery responses.").

determining the identity of data custodians,[16] and interviewing those custodians to identify the sources of relevant information.[17]

Counsel should also help the client implement measures to preserve relevant information.[18] Promptly issuing a litigation hold after the duty to preserve attaches is an essential requirement to accomplishing preservation objectives.[19] Follow up steps must also be taken to ensure that such information is collected before custodians (whether individuals or electronic data repositories) unwittingly or intentionally destroy such information.[20] Those steps may include suspending aspects of corporate information retention policies, adjusting retention settings on mobile communication applications, or imaging smartphones and other mobile devices.[21]

With relevant information accounted for, counsel should triage the data to better understand the quality, nature, and extent of the client's information. Doing so will enable counsel to choose search methodologies and analytical tools that are best situated for identifying responsive information for production.[22]

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16. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (emphasizing that a party's duty to preserve evidence includes identifying "key players" who possess relevant information).

17. *See Small*, 2018 WL 3795238, at *18, *43, *62 (emphasizing the role of thorough custodian interviews in effectuating preservation and production responsibilities).

18. *See* Paisley Park Enters., Inc. v. Boxill, 330 F.R.D. 226, 233–34 (D. Minn. 2019) (criticizing defendants for failing to take basic measures that would have ensured preservation of their relevant text messages); Waymo LLC v. Uber Techs., Inc., No. C 17-00939, 2018 WL 646701, at *15 (N.D. Cal. Jan. 30, 2018) ("facing accusations of spoliation, Uber has reversed course and, in a performance deserving of an academy award claims the exact opposite — that it did not reasonably foresee this litigation in 2016 . . . Uber's own statements show otherwise.").

19. *See HM Elecs. Inc.*, 2015 WL 4714908, at *21–22.

20. *See* FED. R. CIV. P. 37(e). advisory committee's note to 2015 amendment (providing that a party must take reasonable steps to preserve relevant information after a duty to preserve arises to avoid sanctions); NuVasive, Inc. v. Kormanis, No. 18-cv-0282, 2019 WL 1171486, at *1 (M.D.N.C. Mar. 13, 2019), *report and recommendation adopted*, 2019 WL 1418145 (M.D.N.C. March 29, 2019) (holding that defendant's failure to disable the 30-day automated destruction feature on his iPhone resulted in the spoliation of relevant text messages); GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318-LPS, 2016 WL 3792833 at *14 (D. Del. July 12, 2016), *aff'd in part and vacated in part*, 930 F.3d 76 (3d Cir. 2019) (issuing an adverse inference instruction to address harm caused when a senior executive destroyed electronic information and instructed subordinates to do similarly in contravention of defendant's litigation hold instructions).

21. *See* Franklin v. Howard Brown Health Ctr., No. 1:17 C 8376, 2018 WL 4784668, at *4–5 (N.D. Ill. Oct. 4, 2018); *report and recommendation adopted*, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018) (faulting defendant's general counsel for failing to suspend aspects of defendant's instant messaging system); Small v. Univ. Med. Ctr., No. 13-cv-0298, 2018 WL 3795238, at *60–61 (D. Nev. Aug. 9, 2018).

22. *See* Progressive Cas. Ins. Co. v. Delaney, No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563467, at *9 (D. Nev. July 18, 2014) (observing that plaintiff had determined that technology-

In selecting search methodologies, counsel should consider what are the most effective and efficient approaches for identifying responsive information for production purposes.[23] Attention must also be given to the methods for identifying key information underlying claims or defenses.[24] Pragmatic considerations such as cost and counsel's ability to use particular search technologies should also factor into the decision-making.[25] These issues are likewise applicable to searches that counsel will conduct in document productions made by adversaries.

B. Know the FRCP Case Management Provisions

Having preserved the client's evidence and then chosen suitable methodologies for addressing search needs, counsel is now prepared to engage with litigation adversaries. To facilitate that engagement, the Civil Rules Advisory Committee has promulgated various procedures in the FRCP that promote case management.[26] Understanding those procedures and their respective roles is essential for effectuating proactive discovery planning. This is especially the case with the Rules that emphasize cooperation and transparency.

1. FRCP 1

The guiding touchstone of case management is found in FRCP 1. Rule 1 establishes that judges and litigants are bound "to secure the just, speedy, and inexpensive determination of every action and proceeding."[27] These overarching purposes of litigation are not merely suggestions to be

assisted review was a better methodology to address its production needs than search terms only after entering into a search term protocol with defendants).

23. *See* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 173 (2017) (discussing in Principle 6 the benefits that "sophisticated search methodologies" provide in terms of reducing cost and production burdens).

24. *See* John M. Facciola & Philip J. Favro, *Safeguarding the Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection*, 8 FED. CTS. L. REV. 1, 5 (2015) ("Lawyers and litigants have additionally gravitated toward predictive coding due to its utility in identifying the key documents required to establish their claims or defenses.").

25. *See Commentary on Proportionality in Electronic Discovery*, *supra* note 23, at 173–75.

26. The U.S. Courts' website provides an explanation on the nature and purpose of the Civil Rules Advisory Committee and other federal rules advisory committees. *See Committee Membership Selection*, U.S. CTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection [https://perma.cc/7FD3-G8LR] ("The Supreme Court first established a rules advisory committee in June 1935 to help draft the Federal Rules of Civil Procedure, which took effect in 1938. Today, Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, Criminal Procedure, and the Rules of Evidence carry on a continuous study of the rules and recommend changes to the Judicial Conference through a Standing Committee on Rules of Practice and Procedure.").

27. FED. R. CIV. P. 1.

disregarded when inconvenient. Instead, they comprise a tripartite mandate that requires parties and their counsel to employ efficient and cost-effective litigation measures.[28]

One of the best ways to achieve the Rule 1 objectives is to engage in cooperative advocacy, particularly in discovery.[29] As the Chief Justice of the United States recently emphasized, FRCP 1 places an obligation on "lawyers to work cooperatively in controlling the expense and time demands of litigation."[30] Such a duty is not aspirational. It encompasses a common-sense approach to case management in discovery.[31] This is evidenced by various court decisions.

One example is *City of Rockford v. Mallinckrodt ARD, Inc*.[32] In that case, the court resolved a dispute that had kept the parties from finalizing their protocol regarding the production of ESI in discovery.[33] Counsel had addressed every provision in their negotiations regarding the protocol except one.[34] In its order, the court resolved the issue, but not before praising the lawyers for their cooperative efforts. The court observed that those efforts were consistent with the obligation to engage in "zealous advocacy" while also satisfying the Rule 1 mandate.[35]

In a different yet no less instructive scenario, the court in *Steuben Foods, Inc. v. Oystar Group* relied on Rule 1 in its determination to lift the number and duration of depositions the parties would take in that lawsuit.[36] The court implied that such a step would satisfy notions of proportionality implicit in FRCP 1 and expressly memorialized in FRCP 26(b)(1).[37] Though not without some reservations, the court ultimately

28. *See* Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 942–43 (2012) ("cases . . . recognize the value of the Rule 1 decree in addressing unreasonable eDiscovery expenses and delays.").

29. *See* Solo v. United Parcel Serv. Co., No. 14-12719, 2017 WL 85832, at *2 (E.D. Mich. Jan. 10, 2017) (observing that parties have a "heightened duty of cooperation in procedural matters such as discovery.").

30. Roberts, *supra* note 5, at 6.

31. *See* Favro & Pullan, *supra* note 28, at 943 ("Rule 1 teaches that zealous advocacy in discovery must be tempered by the need to reduce costs and expedite matters.").

32. City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489 (N.D. Ill. 2018).

33. *Id.* at 491–92.

34. *Id.* The parties could not agree on whether they should sample the "null set," which are the documents from the universe of potentially responsive information that did not receive hits from the parties' search terms. *Id.* The court ordered the parties to sample their respective null sets and turn over any responsive documents previously withheld from production. *Id.* at 496.

35. *Id.* at 491.

36. *See* Steuben Foods, Inc. v. Oystar Grp., No. 10–CV–00780-EAW-JJM, 2015 WL 9275748, at *1 (W.D.N.Y. Dec. 21, 2015).

37. *Id.* at 1.

entrusted the parties to police their own actions by cooperatively taking "only that discovery" needed for establishing their claims and defenses.[38]

Steuben Foods is likewise significant since it shows the inextricably intertwined nature between cooperative conduct and proportionality standards. Indeed, several courts have noted that cooperation and proportionality are joint touchstones in discovery.[39] For example, the court in *Solo v. United Parcel Service* observed that "linking the concepts of cooperation and proportionality" is essential for resolving discovery issues.[40] The *Solo* court also noted that the application of these concepts is particularly important when discovery involves large amounts of ESI.[41]

Most litigation today—even small matters—can involve large volumes of ESI.[42] Without the "common-sense concept of proportionality" and the tempering influence of cooperation,[43] ESI discovery can quickly become unwieldy and spiral out of control. In such an environment, discovery becomes an incubator for abuse that can proliferate and "like a cancerous growth . . . destroy a meritorious cause or defense."[44] To prevent such a scenario, counsel have "an affirmative duty to work together" and with the court to employ proportionality standards with the objective of achieving just and speedy results.[45]

With this backdrop in mind, counsel should consider approaching their Rule 1 duty through the formal procedures offered by FRCP 26(f) and FRCP 16.

38. *Id.*

39. *See, e.g.*, Solo v. United Parcel Serv. Co., No. 14-12719, 2017 WL 85832, at *2 (E.D. Mich. Jan. 10, 2017); *Steuben Foods*, 2015 WL 9275748, at *1; Siriano v. Goodman Man. Co. L.P., No 2:14-cv-1131, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015).

40. *Solo*, 2017 WL 85832, at *2.

41. *Id.*

42. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment (discussing the impact of the information explosion and its impact on electronic discovery).

43. *See* Roberts, *supra* note 5, at 6.

44. Calcor Space Facility, Inc. v. Super. Ct., 53 Cal. App. 4th 216, 221–23 (1997) (urging courts to curtail "obnoxious" and "promiscuous discovery" practices and beseeching parties to use "discovery devices . . . to facilitate litigation rather than as weapons to wage litigation.").

45. Roberts, *supra* note 5, at 6; FED. R. CIV. P. 1 advisory committee's note to 2015 amendment ("Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."); *see also* Henson v. Turn, Inc., No. 15-cv-01497, 2018 WL 5281629, at *5 (N.D. Cal. Oct. 22, 2018) (expounding on the nature and scope of proportionality considerations in connection with the parties' discovery dispute).

2. FRCP 26(f)

It is axiomatic to suggest that effective case management begins with a meaningful Rule 26(f) conference.[46] FRCP 26(f) directs parties to develop a "proposed discovery plan" before the court schedules a case management conference or issues a scheduling order.[47] This effectively requires counsel to confer on a variety of discovery matters and then either reach agreement on how to address them or submit those issues to the court for its resolution.[48]

The Rule 26(f) conference thus provides a straightforward mechanism for parties to disclose preservation challenges, explore opportunities for phasing discovery, and negotiate an ESI protocol regarding search and production.[49] It also offers counsel an opportunity to remove matters from motion practice on which the parties can reach agreement.[50] This includes placing reasonable limitations on privilege logging, entering into protective orders to safeguard confidential information, and stipulating to non-waiver orders under Federal Rule of Evidence 502(d).[51] Any of which can help move a case forward by eliminating barriers that frequently impede the progress of discovery.

i. FRCP 26(f) Conferences Require Transparency and Cooperation

Unfortunately, lawyers have often approached this obligation casually or have even disregarded it entirely.[52] Such a scenario truly

46. *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 71–73 (2018) (emphasizing the significance of the Rule 26(f) conference in promoting the orderly process of discovery).

47. FED. R. CIV. P. 26(f)(2).

48. *See* FED. R. CIV. P. 26(f)(2) advisory committee's note to 2015 amendment ("But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own."); Lanard Toys Ltd. v. Dolgencorp, LLC, No. 3:15-cv-849-J-34PDB, 2016 WL 7031326, at *3 (M.D. Fla. Jan. 21, 2016) (discussing the purposes and benefits of the Rule 26(f) conference).

49. *See* Burd v. Ford Motor Co., No. 3:13-cv-20976, 2015 WL 4137915, at *8 (S.D.W.Va. July 8, 2015) (detailing the nature and purposes underlying the Rule 26(f) conference).

50. *See* N.T. v. Children's Hosp. Med. Ctr., No. 1:13CV230, 2017 WL 5953118, at *8 (S.D. Ohio Sept. 27, 2017) (reflecting on the importance of a Rule 26(f) discovery plan for averting satellite litigation over discovery issues); Philip J. Favro & Mitchell D. Dembin, *Changing the Culture of Discovery*, 37 AM. J. TRIAL ADVOC. 587, 599 (2014) (listing practical examples of cooperation that can reduce motion practice).

51. *See* Craig D. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55, 116 (2015).

52. *See* Ruiz-Bueno v. Scott, No. 2:12–cv–0809, 2013 WL 6055402, at *4 (S.D. Ohio Nov. 15, 2013) (discussing efforts that defendants' counsel should have taken at the Rule 26(f) conference to have obviated the parties' discovery dispute); RONALD J. HEDGES ET AL., MANAGING DISCOVERY

represents a missed case management opportunity.[53] Without a meaningful 26(f) conference, litigation can become mired in motion practice whose purpose is to obtain the very information that should have been disclosed at the conference.[54] The *Ruiz-Bueno v. Scott* decision is instructive on this issue.[55]

In *Ruiz-Bueno*, plaintiffs used motion practice to seek clarity regarding defendants' efforts to respond to plaintiffs' prior written discovery requests.[56] In particular, plaintiffs sought to understand the process by which defendants searched for responsive ESI.[57] Defendants had refused to disclose the requested information, objecting that plaintiffs sought "discovery about discovery," which they argued was beyond the scope of discovery.[58]

While sympathetic to defendants' arguments, the court still ordered them to disclose how they conducted their searches for relevant information.[59] The court held that such information should have been turned over at the parties' 26(f) conference.[60] Observing that FRCP 26(f) provides for "cooperative planning, rather than unilateral decision-making," the court explained that such a paradigm would have led to dialogue over the nature and extent of defendants' search for responsive ESI.[61] Had the parties followed this approach, the search details that plaintiffs sought to compel could have been cooperatively disclosed at the outset of discovery.[62]

Ruiz-Bueno demonstrates the imprudence of opacity at the 26(f) conference. Holding back non-privileged information regarding the search process did nothing to advance the matter toward resolution for defendants. Instead, it led to delays and increased the costs of litigation for the parties. Worse, it caused defendants' lawyers to lose face with the

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OF ELECTRONIC INFORMATION 9 (Federal Judicial Center, eds., 3d ed. 2017) ("All too often, attorneys view their obligation to 'meet and confer' under Federal Rule of Civil Procedure 26(f) as a perfunctory exercise.").

53. *See N.T.*, 2017 WL 5953118, at *8 ("it does not appear that Plaintiff ever availed herself of the opportunity, early in litigation, to jointly develop pursuant to Fed. R. Civ. P. 26(f)(2) a discovery plan to maximize the production of ESI.").

54. *Id.*

55. *Ruiz-Bueno*, 2013 WL 6055402, at *4.

56. *Id.* at 1.

57. *Id.*

58. *Id.*

59. *Id.* at 4.

60. *Id.*

61. *Id.*

62. *Id.*

court and with opposing counsel.[63] A strategy of disclosure during the 26(f) conference could have obviated these issues and allowed defendants to more efficiently and effectively manage the outcome of discovery.[64]

Contrast the outcome in *Ruiz-Bueno* with the results in *City of Rockford* and *Steuben Foods*. In each of those matters, early transparency and cooperation led to more effective results at the outset of discovery.[65] This strategy allowed the respective matters to proceed forward with merits discovery instead of becoming trapped in satellite litigation.

ii. The Need for Continuing Meet and Confer Efforts

A successful 26(f) conference represents a good "first step" in effectively managing discovery and the case as a whole. Nevertheless, it is just that—a first step. Counsel should view the 26(f) conference as a continuing opportunity to address issues as they arise during litigation.[66] Unless counsel continue to approach discovery through the lenses of cooperation and transparency, cases can devolve into protracted motion practice despite earlier, successful results.[67]

Just such a scenario transpired in *Rio Tinto PLC v. Vale S.A.*[68] In *Rio Tinto*, the parties entered into a stipulated protocol regarding their anticipated use of technology-assisted review ("TAR") to identify responsive information in discovery.[69] No sooner had counsel executed the protocol than the parties engaged in frequent and fervent motion practice over the meaning of its provisions.[70] After several months of

63. *See id.* at 3. ("In an ideal world . . . counsel would have recognized, early in the case, the potential for disagreements about proper search protocols, and would have actively sought to avoid such disagreements through collaboration.").

64. *See also* Lanard Toys Ltd. v. Dolgencorp, LLC, No. 3:15-cv-849-J-34PDB, 2016 WL 7031326, at *2, *4 (M.D. Fla. Jan. 21, 2016) (discussing the purposes and benefits of a Rule 26(f) conference and deciding against plaintiff's request to compel defendant to enter into an ESI agreement due to fundamental, good faith differences between the parties on ESI production); Burd v. Ford Motor Co., No. 3:13-cv-20976, 2015 WL 4137915, at *8 (S.D.W.Va. July 8, 2015).

65. *See* discussion *supra* Part II.B.1.

66. *See* HEDGES, *supra* note 52, at 9, 15 ("Rule 26(f) should be viewed as an ongoing process for negotiating a discovery plan that can prevent discovery disputes or identify them early so that they can be brought to the court for resolution before they become more complicated and difficult.").

67. *See* Webasto Thermo & Comfort v. BesTop, Inc., 326 F.R.D. 465, 469 (E.D. Mich. 2018) ("The stipulated ESI Order, which controls electronic discovery in this case, is an important step in the right direction, but whether as the result of adversarial overreach or insufficient effort, BesTop's proposed search terms fall short of what is required under that Order.").

68. Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125 (S.D.N.Y. 2015).

69. *Id.* at 129.

70. *See, e.g.*, Stipulation and Order Re: Revised Validation and Audit Protocols for The Use of Predictive Coding, Rio Tinto PLC v. Vale S.A., No. 1:14-cv-03042(RMB)(AJP) (S.D.N.Y. Sep. 8, 2015) (ECF No. 338) (approving the parties' revised TAR protocol); Rio Tinto PLC v. Vale S.A., No.

fighting over the use of TAR, the court issued an unusually explicit admonishment, beseeching the parties to "learn to follow Fed. R. Civ. P. 1 . . . [and] cooperate more."[71]

Rio Tinto teaches that early agreements on discovery issues are not enough. The parties must continue to work together consistent with Rule 1 to cooperatively and transparently handle discovery issues as they arise. As they do so, counsel will better manage the case by keeping litigation progressing and not allowing it to stall.[72]

3. FRCP 16

Rule 16 serves an important role as a judicial checkpoint in litigation.[73] Under the rule, the court may schedule a case management conference to set expectations and address unresolved disputes from the 26(f) conference.[74] In this role, a Rule 16 conference functions as a judicial bulwark to prevent discovery from running amok and avert other "wasteful procedural maneuvers."[75] This is particularly the case when the court must confront litigants whose counsel have been unable to engage in a meaningful 26(f) conference or are otherwise at odds on discovery issues.[76]

While courts may issue a perfunctory scheduling order in lieu of the conference, counsel should insist on a formal meeting under FRCP

1:14-cv-03042-RMB-AJP, 2015 WL 4367250 at *2 (S.D.N.Y. July 15, 2015) (appointing a special master to address the parties' continuing disputes over TAR); Joint Letter, Rio Tinto v. Vale, No. 1:14-cv-03042, at *7 (S.D.N.Y. May 6, 2015) (ECF No. 246) (memorializing the court's resolution of the parties' dispute over the use of search terms with TAR).

71. Memo Endorsed Order at *1, Rio Tinto v. Vale, 1:14-cv-03042, (S.D.N.Y. Aug 13, 2015) (ECF No. 319).

72. *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 365 (D. Md. 2008) ("Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute.").

73. *See* Gensler, *supra* note 4, at 860–61 ("There is another reason why the initial Rule 16 conference is an optimal time for judges to interact with the lawyers and the parties: it comes at the start of the lawsuit, not the end.").

74. FED. R. CIV. P. 16(a).

75. *See* Roberts, *supra* note 5, at 7 (urging case management efforts that increase communication between judges and lawyers and observing that "a well-timed scowl from a trial judge can go a long way in moving things along crisply.").

76. *See* Guidelines for the Discovery Of Electronically Stored Information, Guideline 2.04, United States District Court for the Northern District of California (Dec. 1, 2015), https://www.cand.uscourts.gov/eDiscoveryGuidelines [perma.cc/H5Z3-EUMX] (directing parties to raise unresolved discovery issues from the Rule 26(f) conference at the initial case management conference).

16(a).[77] The initial case management conference can provide counsel with the opportunity to raise issues that adversaries declined to discuss or on which no agreement was reached during the 26(f) conference.[78] This could include any number of items such as preservation orders, phasing, ESI protocols, limitations on privilege logging, and non-waiver orders.[79] By seeking early judicial intervention on these or other matters, counsel may be able to expedite the resolution of disputes and keep a case moving toward its eventual disposition.

4. Other FRCP Provisions that Effectuate Case Management

Beyond these provisions are various other rules that counsel can use to drive the discovery process.

Counsel should know that proportionality standards expressly determine the scope of discovery for both preservation and production.[80] Indeed, courts, counsel, and clients are all duty-bound to consider the six proportionality factors under FRCP 26(b)(1) and reasonably apply them to discovery issues.[81] Those factors are:

(1) "the importance of the issues at stake in the action;
(2) "the amount in controversy;
(3) "the parties' relative access to relevant information;
(4) "the parties' resources;
(5) "the importance of the discovery in resolving the issues; and
(6) "whether the burden or expense of the proposed discovery outweighs its likely benefit."[82]

With courts increasingly leveraging these standards to decrease "unnecessary or wasteful discovery" and to encourage cooperative advocacy, counsel should understand and apply the concepts of proportionality.[83]

77. *See* Roberts, *supra* note 5, at 10–11.

78. *See* Gensler, *supra* note 4, at 853 (urging counsel to consider the Rule 16 case management conference "not as a disruption to their usual case-development practices but as opportunities for skilled and effective advocacy.").

79. FED. R. CIV. P. 16(b)(3)(B).

80. *See* FED. R. CIV. P. 26(b)(1). *But see In re* Bard IVC Filters Prods. Liab. Litig., No. MDL 15-02641-PHX, 317 F.R.D. 562, 564 (D. Ariz. 2016) (invoking the maxim "old habits die hard" to explain why so many courts have failed to apply the most recently amended version of Rule 26(b)(1)).

81. *See* FED. R. CIV. P. 26(g)(1).

82. FED. R. CIV. P. 26(b)(1).

83. *See* Roberts, *supra* note 5, at 7.

Early Rule 34 requests are another useful case management provision. Early Rule 34 requests allow counsel to provide adversaries with document demands in advance of or in connection with the Rule 26(f) conference.[84] Doing so can help counsel frame the client's legitimate production needs and contribute to an effective dialogue at the 26(f) conference.[85] To have the desired effect, though, the requests should be narrowly tailored and proportional. Overly broad or otherwise unreasonable production demands will likely have the opposite result, driving adversaries away from cooperative discovery conduct.[86]

An important though not especially obvious case management rule is FRCP 37(e). Rule 37(e) provides a framework for imposing sanctions on parties who fail to preserve relevant ESI.[87] The case management feature to Rule 37(e) is found in the committee note, which discusses suggestions for resolving preservation disputes. As the Advisory Committee observes, adversaries should reach agreements on preservation issues or alternatively seek "judicial guidance" on the "extent of reasonable preservation" measures.[88] Counsel who are looking to efficiently address preservation issues without becoming lost in the "circus" of satellite litigation[89] will do so by taking prompt advantage of the corresponding provisions found in FRCP 26(f)(3)(C) and FRCP 16(b)(3)(B)(iii).[90]

Looming behind all of these case management carrots is the proverbial stick of FRCP 26(g) sanctions.[91] Rule 26(g) imposes a certification requirement on parties and their counsel to conduct a reasonable inquiry and to abide by proportionality standards in connection with discovery.[92] Courts are instructed to meet any failure to satisfy that

84. FED. R. CIV. P. 26(d)(2).

85. FED. R. CIV. P. 26(d)(2) advisory committee's note to 2015 amendment ("This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference.").

86. *See* Webasto Thermo & Comfort v. BesTop, Inc., 326 F.R.D. 465, 467–69 (E.D. Mich. 2018).

87. *See generally* Philip J. Favro, *The New ESI Sanctions Framework Under the Proposed Rule 37(e) Amendments*, 21 RICH. J. L. & TECH. 8 (2015) (describing the elements a moving party must satisfy to obtain sanctions under FRCP 37(e)).

88. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

89. Leksi, Inc. v. Fed. Ins. Co., 129 F.R.D. 99, 105–06, 113 (D.N.J. 1989) (envisioning the possibility of "a circus of peripheral litigation" if the court granted plaintiff's requested discovery).

90. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

91. FED. R. CIV. P. 26(g)(1).

92. *Id.*; *see also* Medicinova v. Genzyme Corp., No. 14-cv-2513, 2017 WL 2829691, at *5 (S.D. Cal. June 29, 2017) (discussing the interplay between the FRCP 26(b)(1) proportionality factors and the FRCP 26(g)(1) certification requirement); Bottoms v. Liberty Life Assurance Co. of Bos.,

requirement—which embodies counsel's Rule 11 obligations in discovery—with sanctions against either or both the litigant and its lawyers.[93]

C. Look for Informal Case Management Opportunities

With so many formal tools available under the FRCP, counsel cannot be blamed for sticking to the Rules' express procedures. Relying exclusively on the FRCP, though, may leave less formal opportunities for case management unexplored. Informal discussions—particularly when coupled with formal procedures—can often lead to greater case management success in discovery.[94]

Courts have observed the wisdom of this course and have promulgated local rules or guidelines to encourage informal communications regarding discovery issues.[95] For example, the United States District Court for the Northern District of California emphasizes in its *Guidelines for the Discovery of Electronically Stored Information* the importance of "an informal discussion" regarding discovery issues:

> *The Court strongly encourages an informal discussion about the discovery of ESI* (rather than deposition) at the earliest reasonable stage of the discovery process. . . . Such a discussion will help the parties be more efficient in framing and responding to ESI discovery issues, reduce costs, and assist the parties and the Court in the event of a dispute involving ESI issues.[96]

Reaching out to adversaries informally may have the effect of diffusing a situation before it becomes problematic. ESI preservation problems, questions about search methodologies, or matters of privilege

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No. 11-cv-01606, 2011 WL 6181423, at *7 (D. Colo. Dec. 13, 2011) (characterizing FRCP 26(g) as a "'stop and think' mandate" for counsel).

93. *See* Rodman v. Safeway Inc., No. 11-cv-03003, 2016 WL 5791210, at *5 (N.D. Cal. Oct. 4, 2016) (ordering defendant to pay a $688,646 sanction under Rule 26(g) for failing to conduct a reasonable inquiry); HM Elecs., Inc. v. RF Tech., Inc., 12-cv-2884, 2015 WL 4714908, at *14 (S.D. Cal. Aug. 7, 2015), *vacated on other grounds* 171 F. Supp. 3d 1020, 1033 (2016) (imposing sanctions on defendant and its counsel for making certifications under FRCP 26(g) that were "false, misleading, and made without first conducting a reasonable inquiry.").

94. *See Commentary on Proportionality in Electronic Discovery*, *supra* note 23, at 150 (suggesting in Principle 1 that parties confer early and informally regarding ESI preservation issues).

95. *See* PRINCIPLES FOR THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION IN CIVIL CASES, PRINCIPLE 1.02, U.S. DIST. CT. FOR THE DIST. OF MD. (July 6, 2016), https://www.mdd.uscourts.gov/sites/mdd/files/ESI-Principles.pdf [perma.cc/X2VQ-J3NH].

96. *Guidelines for the Discovery of Electronically Stored Information*, *supra* note 76, at Guideline 2.03 (emphasis added).

logging, among other things, could all be raised in this manner depending on the circumstances in a given case.

III. METHODS FOR EFFECTIVE CASE MANAGEMENT

With an understanding of the methods available for managing discovery, and having assessed the evidence supporting the client's claims or defenses, counsel is now prepared to apply different approaches to facilitate case management. In this Part, I discuss three ways counsel can do so and thereby avoid the pitfalls that often stymie the progress of litigation. They include: (1) transparently addressing ESI preservation through proportionality standards; (2) exchanging enhanced and early initial disclosures; and (3) addressing ESI search questions through cooperation and transparency.

A. ESI Preservation

1. Unilateral Preservation Challenges

Preservation is one of the most important discovery issues that can affect case management. In instances where ESI has been lost, satellite litigation regarding the issues can dominate a case.[97] Even if sanctions are not imposed, motion practice over ESI preservation generally stops the progress of litigation and can do so for months or even longer.[98] The preserving party must also deal with increased costs and other harm.[99]

The problems arising from ESI preservation failures often result from nondisclosure of these issues to adversaries or the court. Obscuring the fact or the extent of a preservation shortcoming for fear of the resulting

97. *See* Franklin v. Howard Brown Health Ctr., No. 17 C 8376, 2018 WL 4784668 at *1 (N.D. Ill. Oct. 4, 2018) *report and recommendation adopted*, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018) (finding defendant "bollixed its litigation hold," which led to extensive motion practice over lost instant messages and other relevant ESI); Waymo LLC v. Uber Techs., Inc., No. C 17-00939, 2018 WL 646701, at *13 (N.D. Cal. Jan. 30, 2018) (lamenting the inordinate amount of time spent dealing with plaintiff's sanctions motions rather than addressing the merits of its claims); GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318, 2018 WL 273649, at *2 (D. Del. Jan. 3, 2018) (citing defendant's brief with approval, which opined as follows: "To say that much ink has been spilled over the issue of spoliation would be an understatement.").

98. *See* Small v. Univ. Med. Ctr., No. 13-cv-0298, 2018 WL 3795238, *4–22 (D. Nev. Aug. 9, 2018) (stalling discovery for well over four years while a special master and then the court analyzed systemic issues of ESI spoliation).

99. *See Waymo,*, 2018 WL 646701, at *13 ("Waymo's decision to devote so much time and effort to pursuing matters with so little connection to the merits raises the troubling possibility that Waymo is unwilling or unable to prove up a solid case on the merits and instead seeks to inflame the jury against Uber with a litany of supposed bad acts.").

consequences is not an effective case management strategy. It only postpones the likely disclosure of such information at a deposition, a subsequent meet and confer, or a court hearing.[100] Beyond mere embarrassment is the reality of increased fees and costs resulting from collateral motion practice, together with the possibility of sanctions.[101]

Another preservation challenge lies in determining what information a party should keep for litigation. While common law provides that litigants should retain information they know or should reasonably know to be relevant to the claims or defenses,[102] many courts and cognoscenti recommend erring on the side of caution and preserving a broader ambit of information.[103]

Such a strategy—particularly when acting unilaterally—can help prevent a "miscalculation [that] can lead to the permanent loss of relevant information."[104] However, that approach generally results in over-preservation, with its attendant ills of cost increases for storage, processing, and searching that data in discovery.[105]

Some litigants shun over-preservation and risk a leaner alternative to preservation. Under this option, a party adopts a limited view of an adversary's claims or defenses.[106] By arrogating the right to determine the scope of discovery, the preserving party—pursuant to its narrow understanding of the matter—concludes that it need only select a nominal amount of relevant information to preserve and produce in discovery.[107]

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100. *See* GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318-LPS, 2016 WL 3792833, at *3–4, *aff'd in part and vacated in part*, 930 F.3d 76 (3d Cir. 2019) (finding that defendant's senior vice president of sales testified in his deposition that he instructed subordinates to destroy relevant emails).

101. *See id.*; Paisley Park Enters., Inc. v. Boxill, 330 F.R.D. 226, 236–238 (D. Minn. 2019) (imposing monetary and other sanctions on defendants for failing to preserve relevant text messages); *Small*, 2018 WL 3795238, at *57.

102. *See* Oracle Am., Inc. v. Hewlett Packard Enter. Co., 328 F.R.D. 543, 549 n.1 (N.D. Cal. 2018) (declining to impose sanctions on plaintiff after its CEO destroyed over 500 electronic documents given the existence of alternative sources of such information).

103. *See Commentary on Proportionality in Electronic Discovery*, *supra* note 23, at 150.

104. *Id.*

105. *See* JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at app. B-14 (May 2, 2014), https://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf [perma.cc/6KDQ-PCKN]. There are also legitimate security concerns that arise from the over-retention of data. *See* Philip Favro et al., *The New Information Governance Playbook for Addressing Digital Age Threats*, 23 RICH. J.L. & TECH. ANN. SURVEY, at 37–38 (2017) (examining various cyber security incidents and the importance of implementing document deletion policies and practices to reduce cyber risks).

106. *See Commentary on Proportionality in Electronic Discovery*, *supra* note 23, at 150 (discussing the hazards of this approach).

107. This is not to suggest that a party must take "aggressive preservation efforts." FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. Instead, parties "may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly

While this selective method of preservation may seem cost efficient at first, it risks (like nondisclosure) increasing costs in the long run while exposing the party to sanctions that could compromise its litigation position.[108]

2. Proportional and Transparent Preservation

Given the risks associated with the nondisclosure and selective preservation approaches, together with the costs of over-preservation, lawyers should consider alternatives to a unilateral preservation strategy. One of the most effective methods for addressing preservation quandaries is through the transparent application of proportionality standards.

Various courts have approved the application of proportionality standards to ESI preservation questions.[109] Indeed, since the 2015 FRCP amendments, which emphasized its role in the preservation analysis, courts are beginning to draw more frequently on proportionality to analyze whether sanctions are appropriate for particular preservation failings.[110]

Nevertheless, proportionality does not by itself provide a "safe harbor" from preservation sanctions.[111] As courts have explained, proportionality is an "amorphous" and "highly elastic concept" that is subject to varying degrees of interpretation within a given set of

forms." *Id.*; *see also* Incardone v. Royal Caribbean Cruises, Ltd., No. 16-cv-20924, 2019 WL 3779194, at *22–24 (Aug. 20, 2019) (holding that defendant acted reasonably by choosing to preserve selected excerpts of recorded closed-circuit television footage rather than all of the recorded footage).

108. *See The Sedona Principles, Third Edition*, *supra* note 45, at 96–97 (cautioning that courts have "faulted" parties for adopting a unilateral approach to preservation). *See also* Brooks Sports, Inc. v. Anta (China) Co., Ltd., No. 1:17-cv-1458, 2018 WL 7488924 at *18 (E.D. Va. Nov. 30, 2018), *report and recommendation adopted*, 2019 WL 969572 (E.D. Va. Jan. 11, 2019), *judgment modified*, 2019 WL 969569 (E.D. Va. Feb. 5, 2019) (imposing a sanction of default judgment on defendant after it refused to produce relevant messages made through the WeChat platform).

109. *See, e.g.*, *Incardone*, 2019 WL 3779194, at *20–24 (holding that proportionality factors favored defendant's decision to keep selected excerpts of recorded closed-circuit television footage rather than all recorded footage); Digital Vending Servs. Int'l, Inc. v. The Univ. of Phoenix, Inc., No. 2:09-cv-555, 2013 WL 5533233, at *5 (E.D. Va. Oct. 3, 2013) (holding that it was both reasonable and proportional for the preserving party to retain electronic information from a lost thumb drive); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards.").

110. *See*, *e.g.*, *Incardone*, 2019 WL 3779194, at *22–24; Small v. Univ. Med. Ctr., 13-cv-0298, 2018 WL 3795238, at *67–68 (D. Nev. Aug. 9, 2018) (discussing the importance of proportionality in addressing preservation questions).

111. *See* Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 436 n.10 (S.D.N.Y. 2010) (discussing the benefits and uncertainties surrounding the application of proportionality standards).

circumstances.[112] When applied unilaterally without any degree of transparency, proportionality standards could be misapplied to justify an unreasonable preservation strategy such as the nondisclosure or selective preservation approaches discussed above.[113]

To wield proportionality effectively, counsel should dialogue with adversaries—formally at the 26(f) conference or through informal discussions—regarding the reasonable application of its standards.[114] By transparently approaching adversaries with a proportional solution to preservation issues, counsel can better facilitate the resolution of preservation issues.[115] Those issues generally include one or some combination of the following:

- The destruction of certain evidence by the preserving party;[116]
- The requesting party's interest in having certain evidence preserved;[117] or
- The preserving party's assertion that specific evidence need not be retained.[118]

This approach to preservation will allow the parties to discuss and then negotiate a resolution of the issues. Any disputes will either be resolved by the parties or crystallized for adjudication by the court. Either

112. *Id.*

113. *See* Pippins v. KPMG LLP, 279 F.R.D. 245, 255 (S.D.N.Y. 2012) (rejecting defendant's request to dispose of hard drives with relevant data on proportionality grounds since defendant failed to disclose a sample of the hard drives' contents to plaintiffs).

114. *See The Sedona Principles, Third Edition*, *supra* note 45, at 97 ("A safer course of action is for the parties to engage in a meaningful discussion consistent with the cooperation principles.").

115. *See Guidelines for the Discovery of Electronically Stored Information*, *supra* note 76, at Guideline 2.01 (highlighting the importance of early and continued communications with adversaries regarding preservation issues).

116. *See, e.g.*, Williford v. Carnival Corp., No. 17-cv-21992, 2019 WL 2269155, at *13 (S.D. Fla. May 28, 2019) (issuing FRCP 37(e)(1) curative measures after defendant failed to preserve a relevant x-ray apparently reflecting plaintiff's alleged injuries); Oracle Am., Inc. v. Hewlett Packard Enter. Co., 328 F.R.D. 543, 552–53 (N.D. Cal. 2018).

117. *See, e.g.*, Culhane v. Wal-Mart Supercenter, 364 F. Supp. 3d 768, 774 (E.D. Mich. 2019) (issuing a mandatory adverse inference instruction against defendant as a sanction for failing to preserve relevant video footage after plaintiff requested the information prior to commencement of the lawsuit); Marten Transport, Ltd. v. Plattform Advert., Inc., No. 14-cv-02464, 2016 WL 492743, at *3 (D. Kan. Feb. 8, 2016) (involving defendant's request that plaintiff preserve the web browser history for one of its employees).

118. *See, e.g.*, Lord Abbett Mun. Income Fund, Inc. v. Asami, No. C-12-03694, 2014 WL 5477639, at *3 (N.D. Cal. Oct. 29, 2014); Pippins v. KPMG LLP, No. 11 Civ. 0377, 2011 WL 4701849, at *2–3 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245 (S.D.N.Y. 2012).

way, counsel will have efficiently managed the issue and decreased the risks and costs inherent with unilateral preservation.

i. *Lord Abbett v. Asami*

One of the most instructive cases on the proportional and transparent method of preservation is *Lord Abbett Municipal Income Fund, Inc. v. Asami*.[119] In *Lord Abbett*, plaintiff sought relief from the burden of preserving various computers.[120] At the outset of litigation, plaintiff agreed to preserve the computers at defendants' request despite plaintiff's position that the computers did not contain relevant information.[121] Pursuant to their agreement, plaintiff and defendants agreed to split the cost of preservation ($500 per month) for the computers.[122]

After respectively obtaining either partial summary judgment or summary judgment on plaintiff's claims, defendants declined to pay any further cost to preserve the computers.[123] Plaintiff responded by insisting that defendants cover their share of the preservation costs, especially because defendants continued to demand that plaintiff keep information it deemed to be irrelevant.[124]

In an effort to resolve the parties' dispute, plaintiff reviewed a sample of the data from the computers and definitively concluded that it was irrelevant.[125] Instead of continuing to preserve the computers, plaintiff offered to make them available to defendants so they could inspect and copy any data they believed to be relevant.[126] Defendants rejected this offer, but maintained that plaintiff continue preserving the information and bear complete financial responsibility for doing so.[127]

In response to the parties' impasse, the court issued an order allowing plaintiff to discard the computers.[128] In reaching its decision, the court relied on proportionality considerations. The court held the cost of keeping the computers outweighed any benefit associated with the preservation of their contents.[129] While defendants insisted the computers were a key "source of evidence for purposes of rebuttal and

119. *Lord Abbett*, 2014 WL 5477639, at *3.
120. *Id.* at 1.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1, 3.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 3.
129. *Id.*

impeachment," the court rejected that argument as "speculation" since defendants refused to examine the computers as proposed by plaintiff:

> [Plaintiff] has repeatedly offered to make the computers available for any party's inspection and examination, offers which [defendants] have declined. . . . Defendants have had numerous opportunities to test their belief that the computers may have evidentiary value, but have refused to act on them.[130]

Given defendants' access to the information in dispute[131] and the costs of preserving what appeared to be irrelevant material,[132] the application of proportionality standards militated against forcing further preservation of the computers.[133]

Lord Abbett highlights how a party can effectively address ESI preservation through a transparent and proportional approach to discovery. By examining the computer data at issue, sharing its findings with defendants, and making the computers available for their review, plaintiff furnished defendants with access to the information they argued was relevant.

This approach provided plaintiff with dual avenues for a speedy resolution of the dispute. Had defendants inspected the computers, they would have found the hardware devoid of relevant evidence and stopped insisting that they be retained. Defendants' failure to do so and its refusal to accept any financial responsibility for their continued preservation crystallized the parties' opposing views on preservation. This eventually led the court to absolve plaintiff of any further preservation burden.[134]

In summary, a combined approach of transparency and proportionality enabled plaintiff to effectively manage this discovery dispute.

ii. *Pippins v. KPMG*

In contrast to *Lord Abbett* stands the failed application of proportionality in *Pippins v. KPMG LLP*.[135] Like *Lord Abbett*, *Pippins* involved a party (defendant) who sought to be relieved of a preservation

130. *Id.*

131. *See* FED. R. CIV. P. 26(b)(1) (delineating "the parties' relative access to relevant information" as a proportionality factor).

132. *See id.* (establishing "the burden or expense of the proposed discovery outweighs its likely benefit" as a proportionality factor).

133. *Lord Abbett*, 2014 WL 5477639, at *3.

134. *Id.*

135. Pippins v. KPMG LLP, No. 11 Civ. 0377(CM)(JMC), 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245 (S.D.N.Y. 2012).

burden over computer hardware. Defendant explained that it was holding over 2,500 computer hard drives, at a cost of $600 per drive, for members of the putative classes at issue in that litigation.[136] Having incurred over $1,500,000 in preservation costs for those hard drives and with the expectation that thousands of additional drives might have to be saved for future class members, defendant queried plaintiffs about the possibility of limiting its preservation burden to a sample of 100 drives.[137]

Plaintiffs were amenable to the concept of decreasing defendant's preservation burden. Before agreeing to defendant's proposal, they asked to sample the contents of a few hard drives to better understand the quality and nature of the information.[138] Defendant, however, rejected plaintiffs' request. Regarding defendant's refusal to furnish plaintiffs with access to the hard drives, the court observed:

> KPMG, hiding behind the stay of discovery, insisted it could not produce even one hard drive for inspection by Plaintiffs. It also refused to respond to any question regarding the content of the hard drives, furnish Plaintiffs' access to any hard drives, inform Plaintiffs whether the data on the hard drives might be derived from other sources, or discuss the costs of possible alternatives to preserving the data on the hard drives.[139]

Instead, defendant filed a motion for protective order, seeking judicial approval to preserve a sample of 100 hard drives or alternatively to shift the entire cost of preservation to plaintiffs.[140] Invoking proportionality standards, defendant argued that the high cost of retaining all the hard drives outweighed the benefits of retaining them for the litigation.[141]

The court denied defendant's motion and rejected its disproportionality argument. While acknowledging the role of proportionality in the preservation analysis, the court explained that it could not evaluate defendant's assertion of "disproportionate" preservation burdens.[142] This was because defendant prevented plaintiffs from examining any information on the hard drives.[143] By withholding that information, defendant vanquished its own proportionality argument:

136. *Pippins*, 279 F.R.D. at 250, 253–54 (One of the class actions was certified between the time the magistrate and district court judges issued their respective rulings on defendant's motion).
137. *Id.* at 250–51.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 254, 256.
143. *Id.*

> It smacks of chutzpah (no definition required) to argue that the [court] failed to balance the costs and benefits of preservation when [defendant] refused to cooperate with that analysis by providing the very item that would, if examined, demonstrate whether there was any benefit at all to preservation. . . . *I cannot possibly balance the costs and benefits of preservations when I'm missing one side of the scale (the benefits).*[144]

In conclusion, the court ordered that defendant preserve all of the hard drives (without shifting the cost of preservation) until the parties reached a mutually agreeable sampling methodology.[145]

iii. Transparency Facilitates Proportional Resolution of Preservation Issues

The rationale from *Pippins* supports the notion that parties should be transparent if they expect to obtain favorable proportionality-based rulings on preservation issues.[146] Defendant had shrewdly identified proportionality as the proper vehicle for addressing the issues. Despite such prudence, the cagey manner in which defendant advanced its proposal—without transparency—doomed its suggested resolution to failure. Deprived of critical information required for making a proportionality determination, the court had no choice but to reject defendant's motion.[147]

Indeed, the fundamental difference between *Pippins* and *Lord Abbett* was transparency. While defendant in *Pippins* refused to allow plaintiff to examine any computer hard drives, plaintiff in *Lord Abbett* held nothing back, offering defendants the opportunity to review the contents from the computers at issue.[148] Such transparency eventually led the court to free plaintiff from further preservation burdens relating to the computers. In summary, *Lord Abbett* and *Pippins* teach that transparency is essential to facilitating a proportional resolution of preservation issues.

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144. *Id.* (emphasis added).

145. *Id.* at 254.

146. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.").

147. Pippins v. KPMG LLP, No. 11 Civ. 0377(CM)(JMC), 2011 WL 4701849, at *10 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245, 254, 256 (S.D.N.Y. 2012).

148. Lord Abbett Mun. Income Fund, Inc. v. Asami, No. C-12-03694(DMR), 2014 WL 5477639, at *1, *3 (N.D. Cal. Oct. 29, 2014).

3. Proactively Raise Preservation Issues

To better ensure that a proportional and transparent preservation approach is successful, counsel should proactively deal with preservation issues.[149] Proactivity in the context of preservation could take any number of forms.

For example, some counsel, recognizing that preservation disputes can unreasonably slow the pace and increase the cost of litigation, have included provisions in stipulated ESI protocols for preemptively addressing preservation disputes.[150] In *Martinelli v. Johnson & Johnson*, the parties memorialized in their ESI protocol a specific meet and confer process regarding preservation disputes.[151] The process would require an exchange of information regarding the need for the materials at issue, the relevance and proportionality of such information, and "the suitability of alternative means for obtaining the information."[152] The parties had undertaken such a step given what they perceived was the "unnecessary expense and delay" typically associated with satellite litigation over preservation.[153]

Courts and rules-makers have also recommended that counsel discuss preservation issues with adversaries at the outset of a case and raise any disputes promptly with a judge if an informal resolution appears beyond reach.[154] Lawyers who neglect to follow these guidelines do so at their clients' peril. This is particularly the case with a requesting party who fails to affirmatively request the preservation of specific evidence. That party risks losing access to the evidence without future recourse. This

149. *See* 7TH CIR. ELEC. DISCOVERY COMM., *Principles Relating To The Discovery Of Electronically Stored Information*, at 4 (2d ed. Jan. 2018), https://www.ediscoverycouncil.com/sites/default/files/7thCircuitESIPilotProgramPrinciplesSecondEdition2018.pdf [https://perma.cc/UKC7-J92N] ("The parties and counsel should address preservation issues at the outset of a case and should continue to address them as the case progresses and their understanding of the issues and the facts develops.").

150. *See* Martinelli v. Johnson & Johnson, No. 2:15-cv-01733(MCE)(EFB), 2016 WL 1458109, at *1 (E.D. Cal. Apr. 13, 2016).

151. *Id.*

152. *Id.* at *2.

153. *Id.* (acknowledging as well that such questions implicate disputes over the application and scope of the lawyer-client privilege and work product doctrine).

154. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important."); *Principles Relating To The Discovery Of Electronically Stored Information*, *supra* note 149, at 4 ("If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.").

includes being barred from seeking discovery sanctions for any alleged failure to preserve.[155]

This happened to defendant in *Marten Transport v. Plattform Advertising*.[156] The court rejected defendant's request for sanctions stemming from plaintiff's failure to preserve the web browser history for one of its employees.[157] The court found that plaintiff was under no obligation to keep the browser history when its duty to preserve first attached.[158] It was not apparent from either the claims or the defenses that plaintiff should retain that information.[159] Indeed, plaintiff was unaware of defendant's interest in the browser history until nearly two years after the complaint was filed.[160]

Marten Transport highlights the importance of promptly addressing preservation issues. Had defendant raised its need for the browser history at the outset of discovery, it might have triggered a preservation duty at that time for this crucial piece of information. Had plaintiff *then* failed to preserve the internet history, sanctions might have been in order.[161] In the end, defendant's failure to proactively manage this issue left it without any remedy. *Marten Transport* ultimately teaches that litigants must proactively deal with preservation matters if they expect to efficiently manage a case toward resolution.[162]

Raising preservation issues proactively at the outset of discovery is especially important for sources of evidence that are dynamic like web browser history and communications made through mobile device applications.[163] This is because such information, particularly data shared through mobile messaging applications, "may be easily modified or destroyed by the user, the recipient, the application provider, or by the technology itself."[164] The potential for preservation difficulties

155. Marten Transport, Ltd. v. Plattform Advert., Inc., No. 14-cv-02464, 2016 WL 492743, at *8–10 (D. Kan. Feb. 8, 2016).

156. *Id.*

157. *Id.* at 10.

158. *Id.* at 8.

159. *Id.* at 7–8.

160. *Id.* at 10.

161. *See* FED. R. CIV. P. 37(e).

162. *See* Hannan v. Dusch, 153 S.E. 824, 831 (Va. 1931) ("The law helps those that help themselves, generally aids the vigilant, but rarely the sleeping, and never the acquiescent.").

163. *See* The Sedona Conference, *Primer on Social Media, Second Ed.*, 20 SEDONA CONF. J. 1, 12–17 (2019), https://thesedonaconference.org/publication/Primer_on_Social_Media [https://perma.cc/8JK3-Z82Y] (discussing the dynamic nature of messaging application content and the discovery challenges associated with such data).

164. *Id.* at 10; Paisley Park Enters., Inc. v. Boxill, 330 F.R.D. 226, 233 (D. Minn. 2019) (observing that defendants' relevant text messages were destroyed after they both failed to disable the

surrounding messaging application data is further heightened when parties use ephemeral messaging to safeguard the confidentiality of their communications and reduce the amount of ESI they store.[165]

With businesses and consumers increasingly generating dynamic information, discovery of this data only figures to increase.[166] Indeed, messaging application data has become a significant source of discovery across the spectrum of litigation.[167] This is because messaging application users often share content spontaneously and tend to be less guarded when communicating through messaging apps than they would be in traditional letters or even email.[168]

All of this places an even greater demand on clients and counsel to proactively and transparently handle the preservation of this content. Moreover, the sheer volume of such information calls for the application of proportionality considerations to ensure preservation efforts are more reasonably tailored.[169] In 2019 and beyond, "meaningful case management" of preservation issues will be best handled using a transparent, proportional, and proactive strategy.[170]

B. Enhanced and Early Initial Disclosures

Another method that counsel can use to enable effective case management is exchanging more fulsome initial disclosures. An underutilized option, initial disclosures that provide additional details supporting claims or defenses *in advance of* the Rule 26(f) conference

messaging application's 30-day automated destruction feature and neglected to enable cloud backup of those messages).

165. *See* Philip Favro, *Ephemeral Messaging: Balancing the Benefits and Risks*, PRACTICAL LAW THE JOURNAL at para. 33–37 (June/July 2019) (describing the benefits that ephemeral messaging offers to users, along with practical preservation challenges); Philip J. Favro & Keith A. Call, *A New Frontier in eDiscovery Ethics: Self-Destructing Messaging Applications*, UTAH BAR J., Mar/April 2018, at 40, 40–41 (2018) (examining the ethical and practical challenges associated with preserving data from ephemeral messaging applications).

166. *See Primer on Social Media*, *supra* note 163, at 8–9.

167. *See id.* at 12–17; Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, 171 A.D.3d 680, 680–81 (N.Y. App. Div. 2019) (imposing sanctions on defendants for failing to preserve relevant text messages made through the WeChat messaging application); Calendar Research LLC v. StubHub, Inc., No. 17-CV-04062, 2019 WL 1581406, at *4 (C.D. Cal. Mar. 14, 2019) (ordering production of relevant messages from workplace collaboration tool Slack).

168. *See* Philip Favro & Lauren Schwartzreich, *Safely Navigating Social Media Discovery with the Sedona Conference Primer on Social Media*, BLOOMBERG LAW at para. 3 (Aug. 13, 2018) (discussing generally the discovery challenges associated with social media and messaging applications).

169. *See* Solo v. UPS. Co., No. 14-12719, 2017 WL 85832, at *2 (E.D. Mich. Jan. 10, 2017).

170. Pippins v. KPMG LLP, 279 F.R.D. 245, 251 (S.D.N.Y. 2012).

may help the parties fashion their efforts to obtain core discovery for their respective litigation positions.[171]

1. The Existing Initial Disclosure Requirement Does Not Facilitate Case Management

The initial disclosure requirement under FRCP 26(a) requires that parties share some basic information supporting their claims or defenses.[172] This includes the identity of witnesses and documents, a calculation of alleged damages, and whether an insurance policy exists that could be applied to an adverse judgment.[173]

While initial disclosures were designed to help parties gain a preliminary understanding of an adversary's claims or defenses,[174] they are often so circumspect as to rarely provide meaningful information.[175] Such paucity of detail does little to help the parties advance a matter through the discovery process.[176]

Nor does the timeframe for exchanging initial disclosures facilitate case management. With initial disclosures withheld until the time of the Rule 26(f) conference (or two weeks afterward), they provide no actionable insights that might assist the parties during the actual conference.[177] In summary, the extant initial disclosure requirement does little to improve case management of discovery issues.

2. The Benefits of Enhanced and Early Initial Disclosures

In contrast, exchanging initial disclosures that offer expanded information regarding claims and defenses has the potential to enhance

171. *See* FED. R. CIV. P. 26(a)(1) advisory committee's note to 2000 amendment ("In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.").

172. FED. R. CIV. P. 26(a)(1)(A).

173. *Id.*

174. *See* FED. R. CIV. P. 26(a)(1) advisory committee's note to 1994 amendment (providing that the initial disclosure requirement was added to "accelerate the exchange of basic information about the case.").

175. A similar practice has evolved in other areas of discovery including the preparation of privilege logs. *See generally* Philip J. Favro, *Inviting Scrutiny: How Technologies Are Eroding the Attorney-Client Privilege*, 20 RICH. J. L. & TECH. 2, 43 (2013) ("privilege logs have in practice been converted into a costly game in which litigants disclose as little as possible about the communications they have withheld as privileged.").

176. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958) (observing that discovery is intended to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.").

177. FED. R. CIV. P. 26(A)(1)(C) ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation . . . .").

the 26(f) conference.[178] Parties should consider sharing documents that support their positions, which they would typically just identify in their initial disclosures. As one piece of scholarship posited several years ago:

> Requiring parties to disclose—and not merely identify—documents supporting their positions at trial *before* the Rule 26(f) conference might provide them with greater insight into the positions held by the other side.[179]

By sharing documents, parties may be able to gather insights that could facilitate dialogue about discovery needs at the 26(f) conference. Doing so in advance of the conference could help litigants develop more targeted, early Rule 34 document requests, which would also enhance discovery planning opportunities at the conference.[180]

Exchanging information about witnesses before the 26(f) conference could lead to a more intelligent discussion about the particular custodians that are key players and on whom discovery efforts should focus.[181] By having a better understanding of supporting documents and witnesses, the parties may be able to have a useful colloquy about document productions, the eventual scheduling of depositions, or whether discovery should proceed in phases.[182] All of which has the potential to manage discovery more efficiently and effectively for the parties.

C. Address ESI Search Questions through Cooperation and Transparency

Using cooperation and transparency to handle ESI search questions is another case management technique that offers potential for efficiency

178. *See* FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

179. *See* Favro & Pullan, *supra* note 28, at 977 (emphasis in original).

180. The potential that augmented initial disclosures offer for case management is encapsulated by a pilot program the Federal Judicial Center recently promulgated. Referred to as the Mandatory Initial Discovery Pilot, the program is designed to "accelerate the disclosure of relevant information that would be produced later in litigation in response to traditional discovery requests." Ronald J. Hedges et al., *Managing Discovery of Electronic Information (3d ed.)*, §C at 3, FEDERAL JUDICIAL CENTER (2017), https://www.fjc.gov/sites/default/files/2017/MIDPP%20Illinois%20Northern%20User%20Manual.pdf [https://perma.cc/EEG4-KGYT]; The purpose for doing so is to allow the parties "to better evaluate the strengths and weaknesses of their positions . . . [which] may lead to early resolution of matters before incurring additional legal fees." *Id.*

181. *See, e.g.*, Harbord v. Home Depot U.S.A. Inc., No. 3:16–cv–2179–SI, 2017 WL 1102685, at *2–3 (D. Or. Mar. 24, 2017) (ordering the parties to meet and confer after exchanging initial disclosures and before allowing service of written discovery, and finding defendant's 106 document requests were overly broad and not a good faith attempt to obtain relevant information).

182. *See* Shaffer, *supra* note 51, at 116.

and avoiding satellite litigation. Touting the merits of cooperation and transparency in connection with the development and use of search terms or TAR is not a novel concept.[183] Courts and proponents of legal reform have underscored the benefits of this approach for many years.[184]

1. Problems with Unilateral Conduct relating to Search Issues

However, a continual stream of case law addressing disputes over unilateral action by counsel regarding search issues suggests that adversarial conduct continues to predominate on this issue."[185] While disagreements over the issues are to be expected,[186] shunning cooperation and transparency in favor of unilaterally developing search criteria can lead to intractable questions over the reasonableness of a party's search efforts.[187] Those questions may then give rise to one or a combination of the following problems: satellite motion practice, delays, increased costs, and compromised legal positions. Several cases are instructive on how these problems arise from unilateral search conduct, together with the negative impact they have on parties' case management efforts.

i. Satellite Motion Practice

Satellite motion practice is an all too common byproduct of unilateral conduct relating to ESI searches by counsel.[188] When a responding party provides little if any transparency regarding its search methods, requesting parties will understandably pose questions to determine how a search process has been effectuated.[189] If the responding party persists on a course of nondisclosure, motion practice over the issue will most certainly

183. *See generally* The Sedona Conference, *The Sedona Conference Cooperation Proclamation: Resources for The Judiciary* (Public Comment Version. Dec. 2014).

184. *See* William A. Gross Constr. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Of course, the best solution in the entire area of electronic discovery is cooperation among counsel."); Roberts, *supra* note 5, at 11.

185. *See, e.g.*, Hyles v. City of New York, No. 10 Civ. 3119, 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016) (observing that the responding party declined to use TAR "both because of cost and concerns that the parties, based on their history of scope negotiations, would not be able to collaborate to develop the seed set for a TAR process.").

186. *See* City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 491–92 (N.D. Ill. 2018).

187. *See* Rodman v. Safeway Inc., No. 11-cv-03003, 2016 WL 5791210, at *3–4 (N.D. Cal. Oct. 4, 2016) (finding defendant's unilateral search efforts were "objectively unreasonable" and imposing sanctions on defendant).

188. *See id.*; *The Sedona Principles, Third Edition*, *supra* note 46, at 96–97.

189. *See* Ruiz-Bueno v. Scott, No. 12–cv–0809, 2013 WL 6055402, at *3 (S.D. Ohio Nov. 15, 2013).

follow.[190] This precise scenario played out in *Johnson v. Serenity Transportation, Inc.*[191]

In *Johnson*, plaintiff requested production of relevant information in response to the search terms it shared with defendant.[192] Plaintiff sought that information to prepare its opposition to defendant's pending motions for summary judgment.[193] In response, defendant arrogated to itself the right to determine which responsive information should be disclosed, withholding various relevant documents from production under the guise of proportionality.[194] Without rendering any metrics to support its position,[195] defendant argued that production of such information would be disproportionate since it was superfluous of other documents already produced in the matter.[196]

The court disagreed, overruling defendant's objections and ordering production of all relevant, non-privileged documents that it withheld in response to plaintiff's search terms.[197] The court held that defendant "*cannot unilaterally decide that there has been enough discovery on a given topic*."[198] Proportionality considerations—devoid of any dialogue with plaintiff or the court over their application—did not invest the responding party with "discretion" to withhold relevant evidence.[199]

While *Johnson* dealt with the problem of unilateralism by the responding party, requesting parties may also be guilty of such conduct. Requesting parties who refuse to informally confer over search issues may force a responding party to seek judicial intervention. An instructive example of this scenario is found in *Pyle v. Selective Insurance Company of America*.[200]

190. *See id.*

191. Johnson v. Serenity Transp., Inc., No. 15-cv-02004-JSC, 2016 WL 6393521 (N.D. Cal. Oct. 28, 2016).

192. *Id.* at 1.

193. *Id.*

194. *Id.* at 1–2.

195. *See Commentary on Proportionality in Electronic Discovery*, *supra* note 23, at 167–68 ("Burden and expense should be supported by hard information and not by unsupported assertions. For example, if a party claims that a search would result in too many documents, the party should run the search and be prepared to provide the opposing party with the number of hits and any other applicable qualitative metrics.").

196. *Johnson*, 2016 WL 6393521 at *1.

197. *Id.* at 2.

198. *Id.* (emphasis added).

199. *Id.* at 1.

200. Pyle v. Selective Ins. Co. of Am., No. 2:16-cv-335, 2016 WL 5661749 (W.D. Pa. Sept. 30, 2016).

In *Pyle*, plaintiff requested that defendant produce various emails from several of its employees.[201] When defendant asked plaintiff to jointly collaborate on the development of search terms, plaintiff refused, responding instead that it had no obligation to help search the email accounts of defendant's employees for relevant information.[202] When presented with the dispute, the court expressed shocked that plaintiff would reject an opportunity to cooperate on the development of search terms:

> *Plaintiff's argument totally misses the mark; in fact, it borders on being incomprehensible*. Defendant's request is entirely consistent with both the letter and spirit of the Federal Rules of Civil Procedure regarding the discovery of electronically stored information and this Court's Local Rules.[203]

The court went on to order the parties to cooperatively confer on the development and use of search terms that could identify relevant information among defendant's emails.[204] In doing so, the court urged the parties to reach an agreement "expeditiously" and "amicably" so discovery could proceed without unreasonable delay.[205]

Johnson and *Pyle* respectively demonstrate how unilateral conduct can lead to unnecessary motion practice.[206] Defendant in *Johnson*—instead of providing plaintiff with examples or a description of the documents in dispute[207]—took the position that its production was disproportionate. Plaintiff in *Pyle* rejected defendant's invitation to help develop search terms to identify relevant information. The ensuing motion practice did not benefit the parties whose unilateralism instigated the motions. It only served to increase their discovery costs, delay the proceedings, and possibly cause their counsel to lose some credibility with the court.[208]

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201. *Id.* at 1.

202. *Id.* at 1–2.

203. *Id.* at 2 (emphasis added).

204. *Id.*

205. *Id.*

206. *See also* Burnett v. Ford Motor Co., No. 13-cv-14207, 2015 WL 4137847 at *9 (S.D.W.Va. July 8, 2015) (ordering defendant to make a witness available to testify about its search efforts after determining that defendant "cloaked the circumstances surrounding its document search and retrieval in secrecy, leading to skepticism about the thoroughness and accuracy of that process.").

207. *See Commentary on Proportionality in Electronic Discovery*, *supra* note 23, at 167–68 ("If the party claims that the search results in too many irrelevant hits, the party may consider providing a description or examples of irrelevant documents captured by the search.").

208. *See Pyle*, 2016 WL 5661749 at *2. That the court found plaintiff's position to be "incomprehensible" suggests the court was unimpressed with the quality of counsel's advocacy.

ii. Delays

The *Pyle* court alluded to the problem of delays when it implored the parties to quickly reach an agreement on search terms to eliminate further postponement of the proceedings.[209] Unfortunately, unilateral conduct in the context of searching for ESI frequently hinders discovery and impedes efficient case management. The case of *Progressive Casualty Insurance Co. v. Delaney* illustrates this point.[210]

In *Progressive*, the parties agreed to jointly develop search terms they could use to identify potentially responsive documents.[211] Under the terms of their ESI protocol, plaintiff agreed to manually review the subset of information identified after running the agreed-upon search terms and then produce the relevant documents.[212] What plaintiff did not foresee when it agreed to this process was that the search terms would yield 565,000 potentially relevant documents that it would need to manually review.[213]

Given the anticipated time and costs of a manual review of over one-half million documents, plaintiff unilaterally determined it would instead use TAR to identify potentially responsive information.[214] It was only after it implemented the TAR workflow—and one of the defendants filed a motion to compel—that plaintiff disclosed its use of TAR to its adversaries.[215] When the parties were unable to reach an agreement regarding plaintiff's use of TAR, the court found plaintiff to be at fault.[216] The court forbade plaintiff from using TAR and ordered a blanket production of the 565,000 documents within two weeks.[217]

While plaintiff's lack of transparency regarding its decision to use of TAR resulted in self-inflicted harm, its most significant casualty was case management. Plaintiff expected to dispose of the action quickly, anticipating that its claims would be "fully resolved pursuant to a motion

209. *Id.*

210. Progressive Cas. Ins. Co. v. Delaney, No. 2:11-cv-00678, 2014 WL 3563467 (D. Nev. July 18, 2014).

211. *Id.* at 2.

212. *Id.* at 7.

213. *Id.*

214. *Id.*

215. *Id.* at 9–11.

216. *Id.* at 11.

217. *Id.* at 12. While the court's frustration with plaintiff was understandable, such a production order risked disclosure of irrelevant documents. *See In re* Actavis Holdco U.S., Inc., No. 19-3549, at 3 n.1 (3d Cir. Nov. 22, 2019) (Phipps, J., dissenting) (order denying petition for writ of mandamus) ("[A] court does not spontaneously gain authority to compel production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.").

for summary judgment" and without discovery.[218] However, by agreeing to use an unsuitable search methodology[219] and then furtively turning to TAR, plaintiff delayed the resolution of this discovery issue for several months.[220] This, in turn, stalled plaintiff's efforts to conclude the litigation.

iii. Costs

Delays in discovery are frequently accompanied by increased litigation costs. That certainly transpired in *Progressive* where plaintiff incurred the expense of the rejected TAR workflow, along with the fees and costs associated with opposing a discovery motion. *Progressive* is not an isolated instance. Augmented discovery costs often result from unilateral search efforts. The *Procom Heating, Inc. v. GHP Group, Inc.* case additionally demonstrates this point.[221]

In *Procom Heating*, the issue of increased costs arose in connection with plaintiff's motion to compel.[222] Plaintiff asserted that defendant had produced too few responsive documents in comparison to plaintiff's production.[223] Plaintiff also pointed to third party productions, which captured records that defendant should likewise have produced in discovery.[224]

In response to these issues, the court asked the parties to confer regarding an informal resolution to plaintiff's concerns.[225] When those efforts failed, the court ordered defendant to redo its entire search process.[226] While defendant argued the costs of "starting from scratch" could reach nearly $100,000, the court was unsympathetic.[227] The court observed that defendant chose to proceed unilaterally in its designation of custodians and the development of search terms in response to plaintiff's discovery requests.[228] Indeed, the court pointed out three different times

218. *See* Joint Submission Regarding Discovery Plan and Scheduling Order Special Scheduling Review Requested at 4, Progressive Cas. Ins. Co. v. Delaney, No. 2:11-cv-00678 (D. Nev. 2013) (ECF No. 53).

219. *See* discussion *supra* Part II.A.

220. Defendant served its discovery requests in June 2013. Plaintiff did not begin producing responsive ESI until a year later. *See Progressive*, 2014 WL 3563467 at *1, *12.

221. Procom Heating, Inc. v. GHP Group, Inc., No. 13-cv-00163-GNS, 2016 WL 8203221 (W.D. Ky. July 8, 2016).

222. *Id.* at 1.

223. *Id.*

224. *Id.*

225. *Id.* at 2.

226. *Id.* at 5.

227. *Id.*

228. *Id.*

that defendant's search process was "unilateral" when it should have instead involved "'cooperative planning.'"[229]

Given its lack of cooperation and the possibility that anything less than a do-over could exclude key information, the court reasoned that defendant's projected search costs were not "disproportionate to the needs of the case."[230]

Although there was some disagreement over the accuracy of defendant's projected costs for redoing the production,[231] there should be no dispute that defendant's discovery costs increased exponentially due to its unilateral discovery conduct. Had defendant dialogued with plaintiff regarding custodians and search terms, the parties might have reached an agreement and entirely avoided motion practice. Even if they had reached an impasse, the court may have viewed defendant's arguments more favorably and rendered an order more in line with defendant's other, less burdensome proposals.[232] Regardless of how things may have transpired, defendant would not have incurred the costs it would now be forced to spend redoing its entire document production.

iv. Compromised Legal Positions

Beyond all of these issues stands the problem of a litigant suffering a compromised legal position due to unilateral search efforts. A compromised position could include any number of adverse consequences. While discovery sanctions are one outcome, others could include orders requiring the production of nonresponsive information. This is precisely what transpired in *Winfield v. City of New York*.[233]

In *Winfield*, plaintiffs complained that defendant took a limited view of relevance in connection with its search and review process.[234] As a result, plaintiffs argued that defendant's TAR workflow was improperly developed, causing relevant information to be withheld from production.[235] Plaintiffs sought an order mandating the disclosure of defendant's TAR process, along with categories of documents they argued were improperly withheld as being nonresponsive.[236]

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229. *Id.* at 1, 3–5.
230. *Id.* at 5.
231. *Id.*
232. *Id.* at 4.
233. Winfield v. City of New York, No. 15-CV-05236(LTS)(KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017).
234. *Id. at 2.*
235. *Id.*
236. *Id.* at 6.

The court found defendant's TAR workflow to be adequate, but determined that defendant made errors during the review that resulted in responsive information being withheld from production.[237] To remedy that error, the court ordered defendant to produce 400 nonresponsive documents randomly sampled from its custodians.[238] Such a production order would "increase transparency" into the city's production and allow plaintiffs to ferret out whether there were additional production errors.[239]

By unilaterally construing the scope of relevance, defendant committed an inconceivable error for a responding party: allowing the production (albeit compelled) of hundreds of nonresponsive documents. By giving plaintiffs the opportunity to harvest data from nonresponsive materials, defendant unnecessarily exposed itself to the possibility of broader allegations or even additional claims in the instant litigation or a future lawsuit. All of which could have been avoided had defendant been more transparent with plaintiffs in connection with the search and review process.[240]

2. The Benefits of Transparently and Cooperatively Developing Search Methodologies

In contrast to the problems of unilateral conduct stand the potential benefits that cooperation and transparency offer in the development of search methodologies. To be sure, cooperation and transparency may not be feasible or even merited in a particular matter.[241] Nor are they an elixir for every discovery ill.[242] In some instances, cooperation may not be possible.[243] Nevertheless, parties should still entertain the potential of adversarial cooperation on this issue given its upside for efficiently identifying relevant ESI. Doing so can decrease costs and minimize delays.[244]

237. *Id.* at 11.

238. *Id.*

239. *Id.*

240. *Id.*

241. *See* Hyles v. New York City, No. 10 Civ. 3119(AT)(AJP), 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016) (explaining that defendant declined to enter into a stipulation to use TAR given the poor litigation relationship between the parties).

242. *See* discussion *supra* Part II.B.2.ii.

243. *See Hyles*, 2016 WL 4077114, at *2–3.

244. *See* Story v. Fiat Chrysler Auto., No. 4:17-CV-0012, 2018 WL 5307230, at *3 (N.D. Ind. Oct. 26, 2018) ("The Court encourages counsel for Plaintiff to consider that key word searches or technology assisted review are appropriate and useful ways to narrow the volume of an otherwise overly-broad request, such as this one, and encourages cooperation with opposing counsel to craft an appropriate search.").

Costs may be reduced because the process for identifying relevant information—regardless of the methodology—can proceed in a more orderly manner. If the parties work together and also involve the court (by, for example, having a stipulated ESI protocol entered as a court order), they may decrease the possibility of disputes over the search process.[245] Doing so at the outset of litigation, just as the parties did in *City of Rockford* and *Martinelli*, establishes a practice for handling the issues moving forward.[246]

When disputes do arise, transparency and cooperation can still help bring about a more expeditious resolution than could otherwise be accomplished in a unilateral search scenario.[247] If matters do not resolve informally due to an adversary's subsequent intransigence, a party's efforts at transparency and cooperation may be rewarded by a favorable court ruling. The *Dynamo Holdings Limited Partnership v. Commissioner of Internal Revenue* case is instructive on this issue.[248]

In *Dynamo Holdings*, the parties cooperatively developed a TAR protocol to identify information in response to respondent's document requests.[249] This included a detailed workflow that fully involved respondent in the process of identifying and coding responsive documents.[250] As part of that workflow, the parties prepared an initial set of search terms to help narrow the universe of potentially responsive information on which to run TAR.[251]

The parties' cooperative relationship began to sour after respondent discovered that the number of relevant documents the TAR process identified were fewer in number than those identified by the parties' search terms.[252] Respondent requested and then moved to compel production of the additional documents the search terms identified,

245. *But see* Memo Endorsed Order, Rio Tinto v. Vale, No. 1:14-cv-03042, (S.D.N.Y. 2015) (ECF No. 319); Transcript of Record at 110–11, Fed. Hous. Fin. Agency v. UBS Ams., No. 11-cv-06188 (S.D.N.Y. 2012) (ECF No. 134) (describing the difficulties of the working relationship between counsel of record for the parties).

246. *See* discussion *supra* Part II.B.1, Part III.A.3.

247. *Compare* William A. Gross Constr. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 135–36 (S.D.N.Y. 2009) (expounding the benefits of cooperation in developing search terms), *with* Burd v. Ford Motor Co., No. 13-cv-20976, 2015 WL 4137915, at *8–9 (S.D.W.Va. July 8, 2015) (spotlighting how unilateral search conduct spawns collateral disputes over discovery).

248. Dynamo Holdings Ltd. P'Ship v. Comm'r, 150 T.C. No. 10 (T.C. 2018).

249. *Id.* at 1–2 (explaining that the court "commended" the parties for reaching an agreement regarding the use of TAR, particularly since they had previously been at odds regarding this issue); *See also* Dynamo Holdings Ltd. P'Ship v. Comm'r, 143 T.C. No. 9 (T.C. 2014) (approving petitioner's request to use TAR to respond to respondent's discovery requests).

250. *Id.* at 2–3.

251. *Id.* at 2.

252. *Id.* at 3.

arguing they were "highly likely to be relevant."[253] Petitioner disagreed and instead pointed to the stipulated TAR process the parties followed, which incorporated the "selection criteria" respondent requested to search for relevant information.[254]

In response, the court denied respondent's request and held that petitioner's adherence to the TAR protocol satisfied its FRCP 26(g) obligation.[255] The court noted with approval that petitioner followed the stipulated process.[256] That included transparently providing respondent with all information required to prepare and then establish the validity of the process.[257] Given these factors and the speculative nature of respondent's argument, the court approved petitioner's document production.[258]

Petitioner benefited from following a reasonable TAR process which the parties transparently and cooperatively developed. By providing respondent with access and visibility into the TAR workflow, petitioner was able to demonstrate its reasonableness despite respondent's attempt to circumvent to the protocol. *Dynamo Holdings* accordingly shows that courts may favor parties in search disputes who follow a transparent, cooperative, and properly developed search protocol.[259]

3. Be Aware of Adversarial Traps

While transparency and cooperation often aid the process of identifying relevant information, counsel should be aware that some adversaries may turn these discovery virtues into vices. Indeed, certain counsel perceive cooperation or transparency as weakness and may seek to manipulate or otherwise exploit such efforts in any number of ways. One example of this conduct is the so-called TAR tax.[260] Under this scenario, the requesting party seemingly agrees to the responding party's

253. *Id.*
254. *Id.* at 4.
255. *Id.* at 6.
256. *Id.*
257. *Id.*
258. *Id.* at 3.
259. *See also* Louisiana Crawfish Producers Assoc.-West v. Mallard Basin, Inc., No. 6:10-1085, 2015 WL 8074260 at *3 (W.D. La. Dec. 4, 2015) (ordering an inspection of property over defendants' objections as plaintiffs properly followed the court's case management procedure, which was designed to "speed the discovery process and minimize the need for judicial intervention by implementing a procedure whereby discovery issues could be amicably resolved.").
260. Gareth Evans, *Rethinking TAR: New Technologies and Strategies Should Bring the Promise Closer to Reality*, LEGALTECH NEWS (Dec. 30, 2015), https://www.gibsondunn.com/wp-content/uploads/documents/news/Evans-Rethinking-TAR-New-Technologies-and-Strategies-Legaltechnews-12-30-2015.pdf [https://perma.cc/9ENS-HLAT].

desire to use TAR to identify responsive information.[261] Despite appearances, the requesting party then imposes any number of conditions on its use, essentially forcing the responding party to abandon the possibility of using TAR.[262]

To ferret out this and other types of feigned cooperation, counsel should evaluate the temperament of opposing counsel and the disposition of the adversarial party. Doing so *before* approaching an adversary regarding the use of TAR or other ESI search issues should help counsel determine the nature and extent of their efforts to be transparent and cooperative.

IV. CONCLUSION

The age of electronic discovery has introduced new complexities into the management of discovery. To address these complexities and the challenges they entail, counsel should consider using different techniques to facilitate their resolution. Effective techniques include taking a proportional and transparent approach to ESI preservation, providing enhanced and early initial disclosures, and cooperatively and transparently approaching ESI search questions. While by no means an elixir, they represent a significant improvement in many instances over the traditional approach of unilateralism in discovery. By tactically using these methods, counsel should be able to manage the discovery chess match more efficiently and guide a matter more effectively toward its ultimate resolution.

261. *Id.* ("Ostensibly to ensure that the predictive coding model is properly trained, and inaccurately framed under the guise of seeking 'cooperation' and 'transparency,' these demands may, in fact, be made for the purpose of preventing the producing party from obtaining TAR's benefits.").

262. *Id.* ("Such demands are particularly problematic because they usually involve providing opposing counsel with access to irrelevant documents in those sets. . . . many clients will not be comfortable providing access to irrelevant documents and, if that is required, then they will revert to manual review, with all of its burdens.").